IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL APPEAL NO. 34 OF 2001

Virendra Mardolkar,
s/o Vishwanath Mardolkar,
r/o Dhatwada, Near
MRF Factory,
Usgao, Goa. ... Appellant.

Versus

S T A T E ... Respondent.

Shri S. D. Lotlikar, Senior Advocate with Ms. S. Samant, advocate for the appellant.

Ms. Winnie Coutinho, Additional Public Prosecutor, for the State.

CORAM: D. G. DESHPANDE, J.

DATE: 16th January, 2003.

ORAL JUDGMENT

Heard Shri S. D. Lotlikar, learned Senior Counsel for the appellant and Ms. Winnie Coutinho, Additional Public Prosecutor for the State. This Appeal is directed against the Judgment of conviction of the accused/appellant passed by the IInd Additional Sessions Judge, North Goa, Panaji, by which the appellant came to be convicted under Sections 363, 366, 368 and 376 of the Indian penal Code and he was sentenced to different periods of imprisonment and fine.

2. According to the prosecution, the appellant/accused who was a young boy, 21 years of age at the time of incident, kidnapped a minor girl Meena and took her to different places, kept her for one month and committed rape on her during this period, when her father

lodged a missing report to the police. Thereafter the girl and the appellant/accused were traced, investigation was done, chargesheet was filed and the accused came to be convicted as stated above.

3. Learned counsel for the accused firstly contended that the victim Meena was not examined by the prosecution and her sister has stated that the victim had left for Nepal and her whereabouts were not known. Secondly, the father of the victim, who lodged the missing report, turned hostile and did not support the prosecution. Thirdly, in the missing report, the father had given the age of the victim as 18 years. Next, Dr. Silvano Dias Sapeco, P.W.8, who had examined the victim Meena, has stated in his evidence that there was no evidence of rape and so far as the age of the victim is concerned, the doctor gave certain admission which supported the case of the accused that the girl could be between 18 to 20 years of age on the date of the incident.

4. Shri Lotlikar, therefore contended that when the girl had refused to come before the Court and depose about the incident of kidnapping and rape and the father has turned hostile and not supported the prosecution, then the conviction of the accused firstly under Section 376 of the Indian Penal Code, was totally unjustified. He also contended that in a case of rape or kidnapping, age was a

vital factor and when the father of the victim in his missing report gave the age of the victim as 18 years and when the doctor, P.W.8 had admitted in cross-examination as under:

> "My dental finding was based on finding 28 permanent teeth in the victim girl. It is correct that a person between the age of 18-20 years could have 28 permanent teeth. It is possible under hypothetical circumstances, a female between the age of 18 - 20 can have the same physical development as found by me in the victim girl."

5. It is a matter of fact and on record in the missing report that the father himself had given the age of the girl as 18 years. In the occipital test the girl's age was found to be 15 years with a margin of two years on either side. It has come on record that the accused and the victim girl were residing side by side so they were knowing each other for a considerable period.

6. The father, for reasons best known to him, did not support the prosecution and has stated that the girl left the house under some pretext, but he did not support the case of kidnapping. There is no explanation from the father or from the prosecution as to why in the complaint the father,who was working as a watchman in MRF and who appears to be educated or literate, had given the age of Meena as 18 years. He has also stated in the missing report that he has learnt from his neighbours that

this girl had some love affair with the accused/appellant.

7. Considering, therefore, the evidence coming from the prosecution about the age of the victim girl and the admissions given by the doctor in the cross-examination and the fixing of the age of 15 years in occipital test, which always has a margin of two years on either side, it is difficult to hold that the prosecution has proved beyond reasonable doubt that the girl was a minor on the date of kidnapping. The admission of the father in the missing report directly goes against the prosecution case of the girl being a minor. Further, non-examination of the girl by the prosecution for whatever be the reasons, seriously prejudices the accused/appellant and the court, because the court is not in a position to see the victim and watch her demeanour.

8. Therefore, the case of the prosecution about kidnapping ought to have been disbelieved by the Court in the circumstances.

9. So far as the allegations of rape are concerned, admittedly, there could not be any eye-witnesses to the so-called rape, as the victim girl had gone with the accused and they were living at places which could not be seen. However, the best evidence was the examination of the victim girl in the court, coupled with the medical

evidence. Admittedly, the victim girl never appeared before the Court as a witness and, therefore, for proving the offence of rape the prosecution had to rely upon the evidence of the doctor, P.W.8, only. The doctor, P.W.8, has examined her on 9th June, 1997, and he noted that the victim girl had no bruises or abrasions at the genitals. Her hymen was intact and could hardly admit the tip of the little finger and issued the opinion that the physical examination did not reveal evidence of sexual intercourse.

10. The learned Additional Public Prosecutor tried to contend that when the vaginal swabs were taken and vaginal smears were prepared and sent to the serologist, CFSL, Hyderabad and when the report showed that spermatozoa in the vagina suggestive of penetration, was found, this should be taken as sufficient evidence to prove rape. It is difficult to accept this submission for two reasons. Firstly, the prosecution has not been able to prove that the girl was a minor, or had not attained majority. Secondly, the girl herself could not be examined by the prosecution, and thirdly, the physical examination did not disclose any evidence of sexual intercourse. Therefore, merely finding spermatozoa in the slides cannot be held as conclusive proof.

11. The trial Court however, did not given any weightage to the non-examination of the girl, the turning

hostile of the most important witness, i.e. the father of the girl and so also her sister, the absence of medical examination regarding rape and the admission given by the doctor about the age. Consequently, the conclusions arrived at by the trial Court regarding guilt of the accused are without any basis.

12. The Appeal is allowed, the accused/appellant is acquitted of the charges under Sections 363, 366, 368 and 376 of the Indian Penal Code. The bail bond stands cancelled. If he has paid the fine, the same should be refunded to him.

D. G. DESHPANDE,J.

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